

This letter discusses the issue of nexus. See Quill v. North Dakota, 112 S. Ct. 1902 (1992). (This is a GIL.)

December 8, 1998

Dear Mr. Xxxxx:

This letter is in response to your letter dated September 23, 1998. The nature of your letter and the information you have provided require that we respond with a General Information Letter which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 86 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

We have been retained by a new client who is starting a new business. The business will sell dental equipment and supplies from a main office in Wisconsin.

The supplies will be sold by catalog and will include the products listed on the enclosed page. Sales representatives that may travel into Illinois to make a sale will sell equipment. The sales representative may eventually live in Illinois. In addition, the company will also service the equipment that it sells.

We have searched your state website and have not been able to satisfy ourselves with the answers to the following questions:

1. Will the catalog supply sales be sales taxable?
2. Will the equipment sales be sales taxable?
3. Will the service revenue be sales taxable?
4. What rates of tax will apply to taxable sales?
5. Is there a better or more definitive source of information for sales to dentists?

Please provide all necessary applications and pertinent publications with your response. Since our client hopes to make its first sales in October 1998 your quick response will be greatly appreciated.

If you have any further questions please contact this office.

The following general discussion is helpful in determine if your client has nexus with Illinois. An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

Please find enclosed a copy of 86 Ill. Adm. Code 130.310, Food Drugs, Medicines and Medical Appliances. Food, drugs, medicines and medical appliances are subject to a low rate of tax, 1% plus applicable local taxes. Items that do not qualify as food, drugs, medicines and medical appliances are subject to the high rate of tax, 6.25% plus applicable local taxes.

Section 130.310(c)(1) defines a medical appliance as an item which is intended by its manufacturer for use in directly substituting for a malfunctioning part of the body. Included in the exemption as medical appliances are such items as artificial limbs, dental prostheses and orthodontic braces, crutches and orthopedic braces, wheelchairs, heart pacemakers, and dialysis machines (including the dialyzer). In general, dental items such as etchants and polishing discs, mandrels, paste, cups and points do not qualify as medical appliances.

As stated above, dental prostheses constitute medical appliances. They are items which are used as a direct substitute for a malfunctioning part of the body. These include posts and cores used to replace missing tooth structure,

pins used to stabilize restorative devices such as crowns, sealants used to fill pits and fissures, gutta percha points used as root canal filling material, bases put on a tooth before restoration can be completed, and cements used to adhere restoration material to the tooth structure.

Items which do not qualify and are therefore subject to the high rate of tax include consumable supplies, needles, instruments, tools, non-sterile dressings, bandages and gauze, bibs, trays, containers, tooth brushes, and other items which do not directly substitute for a malfunctioning part of the body.

In general, maintenance agreements that cover computer software and hardware are treated the same as maintenance agreements for other types of tangible personal property. Please refer to 86 Ill. Adm. Code Sec. 130.1935(b), enclosed. The taxability of maintenance agreements depends upon if charges for the agreements are included in the selling price of the tangible personal property. If the charges for the agreements are included in the selling price of the tangible personal property, those charges are part of the gross receipts of the retail transaction and are subject to tax. No tax is incurred on the maintenance services or parts when the repair or servicing is performed.

If maintenance agreements are sold separately from tangible personal property, sales of the agreements are not taxable transactions. However, when maintenance services or parts are provided under the maintenance agreements, the service or repair companies will be acting as service providers under provisions of the Service Occupation Tax Act that provide that when service providers enter into agreements to provide maintenance services for particular pieces of equipment for stated periods of time at predetermined fees, the service providers incur Use Tax based on their cost price of tangible personal property transferred to customers incident to the completion of the maintenance service. See the enclosed copy of 86 Ill. Adm. Code 140.301(b)(3).

I hope this information is helpful. The Department of Revenue maintains a Web site which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.